

**SUPREME COURT OF THE STATE of New York
COUNTY OF WESTCHESTER**

-----X
D.I.,

Plaintiff,

-against -

S.I.,

Defendant.
-----X

DECISION & ORDER¹
Index No. 14749-06

LUBELL, J.

The following papers were considered in connection with defendant's application for an order (I) "disqualifying" this Judge from hearing and determining the remaining issues in this matrimonial action and granting attorney and accountant fees, (II) plaintiff's cross-motion for a Order pursuant to 22 NYCRR §130-1.1 sanctioning defendant and her counsel and directing them to reimburse plaintiff for attorney's fees incurred in connection with defendant's recusal motion, (III) the cross-motion of defendant for an Order imposing sanctions against plaintiff's attorney and plaintiff due to frivolous conduct in cross-moving for sanctions against defendant and her counsel, and (IV) the cross-motion of plaintiff for an Order imposing sanctions against defendant and her counsel and for attorney's fees in connection with defendant's motion for sanctions:

PAPERS	NUMBERED
SEQ 8 Notice of Motion/Affirmation/Affidavit/Exhibits	1
SEQ 9 Notice of Cross-Motion/Affidavit/ Affirmation/Exhibits	2
Affirmation of Attorney for the Children	3
SEQ 10 Notice of Cross-Motion/Affirmation in Support- and in Opposition/Affidavit in Support/Exhibits	4

¹The names of the parties have been redacted for publication purposes.

Defendant's application for "disqualification", more properly recusal, follows this Court's written Decision & Order of May 13, 2008 in which, after an extensive hearing, the Court denied defendant's application to relocate herself and the parties' children to the State of Texas.

Contrary to defense counsel's characterization of the recusal motion as one "based upon [defendant's] views and interpretation of the proceedings and . . . her right to seek a Court Decision which simply seeks [sic] the Court to determine in its own conscience whether it shall remain on the matter", the recusal motion is supported by counsel's affirmation, defendant's seemingly uncompromised and unaudited fifty-three page diatribe on the Court and, to a lesser extent, the Attorney for the Children, among other targets, and defense counsel's certification "pursuant to 22 NYCRR 1301.1 [sic] that to the best of his/her knowledge, information and belief, the annexed document [which includes defendant's affidavit] is not frivolous." Had it been so limited, neither the Court nor plaintiff and his attorney would have had to expend so much time and resources dealing with it.

"Absent . . . a mandatory basis for recusal, the judge himself, subject to his own conscience and discretion, [is] the

sole arbiter of whether to recuse himself" (Rochester Community Individual Practice Ass'n, Inc. v. Excellus Health Plan, Inc., 305 A.D.2d 1007, 1008 [4th Dept., 2003]; People v. Moreno, 70 N.Y.2d 403; see, Judiciary Law §14). It is "[o]nly when alleged bias and prejudice arise from an extrajudicial source and result in an opinion on the merits based on the outside source is disqualification warranted" (People v. Moreno, 70 N.Y.2d 403, 407 [1987]). "In the absence of a violation of express statutory provisions, bias or prejudice or unworthy motive on the part of a Judge, unconnected with an interest in the controversy, will not be a cause for disqualification, unless shown to affect the result" (Matter of Johnson v. Hornblaw, 93 A.D.2d 732, 733 [1st Dept., 1983]). Here, not only does the Court not harbor a bias or prejudice or unworthy motive as charged by defendant, defendant has failed to show how any such allegation, even if true, affected the Court's determination which has more than a sound basis in the record.

There is no mandatory statutory basis for disqualification advanced before the Court (see, Judiciary Law §14, supra). Furthermore, the Court does not find, as a matter of personal conscience (see, People v. Smith, 63 N.Y.2d 41, 68, cert. denied 469 U.S. 1227), that recusal is warranted. The Court is more than confident that it harbors neither bias nor prejudice against plaintiff or defendant in this action.

To grant recusal under these circumstances would be to allow defendant to "judge-shop", and thereby benefit from her own post-hearing attack on not only the Court's determination under the guise of a recusal motion but, in a most inappropriate and unfounded manner, the Court itself and the Attorney for the Children, as well. Mere allegations of court misconduct or bias is not enough, even when advanced as venomously as here. Absent more, the fair and efficient administration of justice should not permit a litigant to benefit from such unfounded attacks. Consequently, the question of recusal is one properly left to the sound and personal conscience of the Court (see, People v. Moreno, supra; People v. Bartolomeo, 126 A.D.2d 375 [2d Dept., 1987])).

In sum, upon due deliberation and examination of its own conscious, the Court finds that it can fairly and impartially preside over all remaining aspects of this case and is further satisfied that under the attendant facts and circumstances, there will not even be the appearance of impropriety. Therefore, the motion is denied.

The denial of the recusal motion does ^{NOT} close the book on the underlying papers. Questions have been raised by way of cross-motion as to whether, given the assertions therein, the arguments advanced thereon, and the attorney certification under

22 NYCRR §130-1.1, frivolity sanctions are appropriate. The Court concludes that they are.

Section 130-1.1 of 22 NYCRR provides:

(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart . . .

. . .

(c) For purposes of this Part, conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

Putting aside for now the outright attacks upon the integrity of the Court, the blatant sarcasm and gratuitous insults, even a cursory review of defendant's fifty-three page affidavit on her motion and her subsequent reply affidavit reveals that it substantially contains arguments that have no legal or factual relation to a recusal motion, contain numerous

arguments and analysis perhaps relevant to reargument or appeal but not recusal, numerous claims for recusal based on the Court's refusal to consider matters that were not introduced into evidence, and entirely new claims based upon alleged post-hearing occurrences about which this Court has no knowledge and defendant no basis to believe that it should, all certified and subscribed by counsel as not being frivolous (see, 22 NYCRR 130-1.1). The frivolity of all this is then only magnified by the defendant's gratuitous name calling and charges against the Court of, among other things, religious and political bias bespoken so cavalierly, and without basis. With counsel's blessing, defendant even avers that the Court refused to allow her to call a witness, the chair of plaintiff's law firm, even though defense counsel waived calling this witness in exchange for a stipulation as to what his testimony would be if called to the stand. Multiple other examples abound.

"The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case" (United States v Grinnell Corp., 384 U.S. 563, 583). "[Disqualification] is directed to personal bias, which means an attitude of extrajudicial origin. A mere showing of prior judicial exposure to the present parties or questions will not invoke [a basis for

disqualification][citations omitted]" (Lyons v United States, 325 F.2d 370, 376, cert den 377 U.S. 969).

It is then nothing but frivolous to advance, especially upon counsel's review and consent, such a myriad of allegations falling outside of these well established parameters, without any showing or argument that they are before the Court for the advancement of "a reasonable argument for an extension, modification or reversal of existing law" (22 NYCRR §130-1.1[c][1]). In addition, there is well established precedent that the fact that this Court has decided the relocation issue against defendant does not warrant disqualification (Board of Ed. of City School Dist. of City of Buffalo v. Pisa, 55 A.D.2d 128, 136 [4th Dept., 1976], see also, People v Horton, 18 N.Y.2d 355; Barry v Sigler, 373 F.2d 835, 836; Lyons v United States, supra). Any argument to the contrary not contemporaneously being advanced for "a reasonable argument for an extension, modification or reversal of existing law", such as is the case here, is, in all respects, frivolous.

Having found the underlying recusal motion or, at the very least, a substantial and material underlying basis for same being frivolous, the Court must now address what sanction to impose and against whom.

Paragraph (b) of section 130-1.1 of NYCRR provides:

The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.

While the imposition of sanctions is limited to \$10,000 for each single occurrence, costs are not so constrained and may include attorneys fees and actual expenses (22 NYCRR 130-1.2; Greene v. Merchants & Businessmen's Mut. Ins. Co., 259 A.D.2d 519, 519-520 [2d Dept., 1999]). Additionally, "[w]here, as here, the frivolous action of counsel results in improper use of the court's time as well as that of [opposing] counsel," the imposition of sanctions directly against counsel is appropriate (CCS Communication Control, Inc. v. Kelly International Forwarding Co., 166 A.D.2d 173, 175 [1st Dept., 1990]).

Among the factors that the Court should consider upon determining whether conduct is frivolous is "the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was

brought to the attention of counsel or the party" (22 NYCRR 130-1.1[c]).

The recusal motion was made by defendant with the assistance and certification of counsel. It is noteworthy that, in response to plaintiff's cross-motion for frivolity sanctions, defendant and defense counsel did not see fit to withdraw the recusal motion or, at the very least, those aspects thereof which clearly have no foundation in law and/or fact as clearly shown by plaintiff's cross-motion papers, but instead chose to move for sanctions against plaintiff and his attorney for having cross-moved for sanctions against defendant and defense counsel. Additionally, upon oral argument defendant and defense counsel stood steadfast and blindly behind the motion for recusal and all grounds advanced therefor in defendant's fifty-three page affidavit and defense counsel's affirmation in support, notwithstanding the contents and obvious merit of plaintiff's responsive and reply papers.

The frivolous conduct before this Court is shared by defendant and counsel, albeit to varying degrees. Without ever knowing (due to attorney/client privilege) what conversations or legal counsel took place between defense counsel and defendant in connection with the bringing and, more importantly, the preparation and formulation of the motion and underlying

affidavits of defendant, the Court finds that an award of counsel fees against the defendant in the amount noticed in the cross-motion, \$7,262.50, and the imposition of a \$2,500 sanction against defense counsel is warranted and appropriate under all the attendant circumstances (see, CCS Communication Control, Inc. v. Kelly International Forwarding Co., 166 A.D.2d 173, 175, 564 N.Y.S.2d 69 [1st Dept., 1990]; see, Dellafiora v. Dellafiora, 172 A.D.2d 715 [2nd Dept.1991][22 N.Y.C.R.R. 130-1.1(d) notice requirement satisfied by the notice provided by request for sanctions]).

The remaining two 22 NYCRR 130-1.1 motions, one by each party, are hereby denied in their entirety, the Court being satisfied that an appropriate penalty has been imposed upon plaintiff's cross-motion hereinabove determined and that no further sanctions are warranted. It is however noteworthy that, in the face of plaintiff's initial frivolity cross-motion, defendant, again with the blessing of counsel, would thereafter continue with her unrestrained rant against plaintiff and his attorney (through her affidavit in support of her cross-motion for frivolity sanctions [Sequence "9"]) to further describe the relocation proceedings as "basically a gang-rape[] in [the] courtroom by a bunch of lawyers all sanctioned by the State of New York."

The one remaining issue is defendant's application for additional pendente lite counsel fees in the amount of \$39,022.68 for past due fees and an additional sum of \$25,000.00 for projected legal services. Defendant also seeks \$18,178.00 to satisfy an outstanding bill of \$8,178.00 for forensic accounting services and \$10,000 for future accounting services, including trial preparation and testimony.

As to applications for counsel fees, 22 NYCRR 202.16(k) provides:

. . . Unless, on application made to the court, the requirements of this subdivision be waived for good cause shown, or unless otherwise expressly provided by any provision of the CPLR or other statute, the following requirements shall govern motions for . . . counsel fees (other than a motion made pursuant to section 237[c] or 238 of the Domestic Relations Law for counsel fees for services rendered by an attorney to secure the enforcement of a previously granted order or decree) . . . :

. . .

(2) No motion shall be heard unless the moving papers include a statement of net worth in the official form prescribed by subdivision (b) of this section

. . .

(5) The failure to comply with the provisions of this subdivision shall be good cause, in the discretion of the judge presiding . . .

(ii) to deny the motion without prejudice to renewal upon compliance with the provisions of this section.

There being neither a net worth statement before the Court nor an application or good cause to excuse same, the motion is

denied without prejudice.

Absent a detailed showing of, among other things, the future services to be rendered by defendant's forensic accountant and the estimated time needed and costs for same through, for example, an affidavit from the forensic expert, defendant leaves the Court with "an insufficient basis upon which to grant that branch of her motion" (see, Corrao v. Corrao, 209 A.D.2d 573, 574; Fischler v. Fischler, 184 A.D.2d 680, 681). Denial is without prejudice to re-application upon a proper showing at which time the Court will also rule upon her application for past due forensic accountant fees which, likewise, should be supported by a more detailed showing than simply an outstanding bill.

The Court is sensitive to the fact that the anger and disdain harbored by the defendant, as conveyed to the Court through her underlying affidavits herein, may be nothing more than an expression of her disappointment and dissatisfaction with the outcome of her relocation application. Perhaps, as well, defense counsel's submission of defendant's certified affidavits (Section 130-1.1) is the result of his miscalculated willingness to have allowed his client an unfettered opportunity to have expressed herself to the Court as she saw fit without regard to the relevance or materiality of her comments to the

underlying motion, its impact on the integrity of the Court, and the time and energy needed by plaintiff and his attorney to properly respond. Nevertheless, 22 NYCRR 130-1.1 exists for the purpose of preventing such submissions so that the parties and the court can properly focus on what is material, relevant and appropriate to whatever proceeding or applications are then before the Court.

Notwithstanding the above, the Court harbors no ill will as against the defendant or defense counsel and maintains its position that the Court's denial of defendant's relocation application is fair and appropriate in the best interest of the children, is supported by the prevailing authority in this State, and is supported by the credible facts as adduced at trial. Upon searching its own conscience and belief, the Court maintains its position, after due and deliberate consideration, that it can be fair, impartial, and without bias to either litigant.

Based upon the foregoing, it is hereby

ORDERED, that defendant's application for recusal is denied; and, it is further

ORDERED, that plaintiff's application for attorney and accountant fees is denied without prejudice as herein indicated; and, it is further

ORDERED, that plaintiff's cross-motion for a Order pursuant to 22 NYCRR §130-1.1 sanctioning defendant and her counsel and directing them to reimburse plaintiff for attorney's fees incurred in connection with defendant's recusal motion is granted to the extent that (a) plaintiff is hereby awarded attorney's fees in the amount of \$7,262.50 payable at the close of the case directly to plaintiff or as a credit against any equitable distribution award and (b) defense counsel is directed to deposit with the Lawyers' Fund for Client Protection (22 NYCRR 130-1.3) the sum of \$2,500 within 10 days of the date of service of a copy of this Decision & Order with Notice of Entry, as and for the frivolity penalty herein imposed; and, it is further

ORDERED, that plaintiff's further cross-motion and defendant's further cross-motion for frivolity sanctions are hereby denied in all respects; and, it is further

ORDERED, that the parties are directed to appear before the Court at 9:30 A.M. on October 6, 2008 for a status conference on all outstanding issues including financial.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York _____

August , 2008

HON. LEWIS J. LUBELL, J.S.C.